

N O. 2 0 1 5 7

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

AMCO ELECTRIC,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

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PETITIONER'S REPLY BRIEF

---

PETITION TO REVIEW AND SET ASIDE  
ORDER OF NATIONAL LABOR RELATIONS BOARD

---

MILLIKAN, MONTGOMERY,  
FRANCISCUS and OLAFSON

By: C. E. MILLIKAN, JR.  
961 East Green Street  
Pasadena, California 91101

Attorneys for Petitioner

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Attorneys for Petitioner



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QUESTIONS PRESENTED

Questions presented as stated on page 2 of Petitioner's  
Opening Brief.

STATEMENT OF FACTS

Statement of facts, except as set forth in the argument are  
as stated in petitioner's brief on pages 2, 3, 4 and 5.

SPECIFICATION OF ERROR

Specification of error as stated on page 5 of Petitioner's  
Opening Brief.



## SUMMARY OF ARGUMENT

In addition to the summary of argument listed on page 6 of Petitioner's Opening Brief, petitioner makes the following additional arguments:

I        AMCO HAS NOT ADMITTED NOR IS THERE SUBSTANTIAL EVIDENCE TO SHOW THAT AMCO FIRED FIVE MEN, INCLUDING CROWE, BECAUSE THEY HAD QUIT THE WEEK BEFORE TO PROTEST THE RECLASSIFICATION OF A WELDER.

II        THERE IS NO SUBSTANTIAL EVIDENCE IN THE RECORD SHOWING THAT CROWE WAS DISCHARGED FOR USING THE RADIO. THERE IS SUBSTANTIAL EVIDENCE IN THE RECORD SHOWING THAT CROWE WAS DISCHARGED FOR GIVING LOWATER, A FOREMAN, ORDERS AND THAT SAID ORDERS WERE MADE OVER THE RADIO.

III       THE EVIDENCE CLEARLY SHOWS THAT CROWE WAS PRIMARILY INTERESTED IN GETTING LOWATER OVER TO SITE C AND CONSEQUENTLY THERE IS NO SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT RESPONDENT'S CONTENTION THAT CROWE WAS PRIMARILY INTERESTED IN GETTING SAVAGE TO SITE C.

IV        THERE IS NO SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT ANY CONCLUSION THAT CROWE WAS FIRED BECAUSE OF ANY PROTECTED ACTIVITIES. THERE IS SUBSTANTIAL EVIDENCE SHOWING THAT CROWE WAS



FIRE FOR GIVING ORDERS TO LOWATER, A FOREMAN.

V THE TRIAL EXAMINER'S RESOLUTION OF CONFLICTING TESTIMONY WAS BASED UPON HIS OBSERVATION OF THE Demeanor OF THE WITNESSES AND NOT OTHERWISE AND AS THIS WAS SUPPORTED BY SUBSTANTIAL EVIDENCE CANNOT PROPERLY BE OVERRULED.

VI WHILE THERE WAS NO SUBSTANTIAL EVIDENCE SHOWING CROWE WAS FIRED FOR CALLING HIS STEWARD, THERE WAS SOME EVIDENCE TENDING TO SHOW CROWE WAS FIRED FOR GIVING ORDERS TO LOWATER, A FOREMAN, TO GO OVER AND GET SAVAGE AND CONSEQUENTLY, EVEN IF THIS VERSION WERE BELIEVED, IT DOES NOT SUPPORT THE CONCLUSION THAT CROWE WAS FIRED FOR ENGAGING IN PROTECTED ACTIVITIES.

VII PROVISIONS OF COLLECTIVE BARGAINING CONTRACT SECTIONS 10 AND 11 OF ARTICLE 3 DO NOT PERMIT A WORKMAN TO GIVE ORDERS TO FOREMEN AND THERE IS SUBSTANTIAL EVIDENCE IN THE RECORD SHOWING THAT THIS IS EXACTLY WHY CROWE WAS FIRED.

### ARGUMENT

Argument as covered in Petitioner's Opening Brief, pages 7 through 16, and the following additional arguments:

The brief for the NLRB contains several statements of fact which require clarification. The references hereafter made do not





cover all such statements, but instead are intended to cover those which are considered by Appellant to be material.

I

AMCO HAS NOT ADMITTED NOR IS THERE  
SUBSTANTIAL EVIDENCE TO SHOW THAT  
AMCO FIRED FIVE MEN, INCLUDING CROWE,  
BECAUSE THEY HAD QUIT THE WEEK BE-  
FORE TO PROTEST THE RECLASSIFICATION  
OF A WELDER.

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Crowe was one of five Amco employees who quit in protest of the classification of a welder during May, 1964. Respondent contends that Amco admitted that a week after the protest quitting (a month or so before the alleged discrimination), Amco laid off the same five employees because they had quit in protest the week before. There is no evidence to support the contended admission. Crowe did not so testify (Rep. Tr. p. 7). Business agent Milne, who gave the only other testimony concerning the matter, testified that the five men who had quit in protest were told about a week later they were to be laid off but didn't receive their checks and reported to work the next morning (Rep. Tr. p. 50). He further testified that Conley, Amco general foreman, told him these five people were laid off because they were the same five who had quit the week before (Rep. Tr. p. 50). This is not an admission that the layoff resulted from the protest the week before, but instead shows only that when Amco laid off some employees (which could have been for any number of reasons including the reason contended



by Respondent), it selected these five to lay off because they were the ones who had quit the week before. In any event, the Business Agent of the Union obviously convinced Amco that it would not be wise to let the men go under the circumstances and they continued at work. There is no evidence that the four men other than Crowe had any further problems. Any suggestion that the firing of Crowe on June 19 was connected with his protest quitting during May is pure conjecture. Business Agent Milne settled that dispute during May. The record thus shows that the Union was able to adjust disputes with the employer, even when the members were wrong in their position, as when the five employees walked off during May, a violation of Article I, Section 5 of the Contract between Amco and the Union.

## II

THERE IS NO SUBSTANTIAL EVIDENCE IN THE RECORD SHOWING THAT CROWE WAS DISCHARGED FOR USING THE RADIO. THERE IS SUBSTANTIAL EVIDENCE IN THE RECORD SHOWING THAT CROWE WAS DISCHARGED FOR GIVING LOWATER, A FOREMAN, ORDERS AND THAT SAID ORDERS WERE MADE OVER THE RADIO.

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Whether or not Crowe ever tried to call Steward Savage on the radio, as contended by Respondent, was disputed. Crowe said he did try (Rep. Tr. pp. 9, 10). Neither Coghlin nor Lowater, both of whom had their radios on, heard any such call by Crowe.

What Crowe said to Lowater on the radio when Crowe



called was disputed between Crowe and Lowater. Respondent contends that Lowater was merely asked to request Savage to go to C Site as testified by Crowe. Respondent agrees with Appellant that the evidence is in conflict on this point. However, Respondent states that Lowater agreed with Crowe (in response to Crowe's call) that his request for Savage to come to C Site would be delivered to Savage, and "added" that he would be right over himself (Respondent's Brief, page 4). The fact is that Lowater testified, in response to Crowe's call, that he, Lowater, would be right over (Rep. Tr. p. 91). That is all Lowater said to Crowe. His statement that he would be right over wasn't any thought added to a statement that Lowater would give a message to Savage. His testimony did not indicate that he told Crowe he would deliver a message to Savage (Rep. Tr. p. 91).

Respondent contends that both Cassidy, Crowe's foreman, and Lowater, the maintenance foreman, told Crowe that he was being fired because he had used the radio to call the steward and that this is undisputed. This is the biggest fallacy in Respondent's argument. The record has no support whatever for such a statement except Crowe's testimony (Rep. Tr. p. 13). Crowe's testimony was directly contradicted by Business Agent Milne (who said he didn't know of any men who were fired by Amco for improper use of the radio (Rep. Tr. pp. 52-53), by Norman Coghlin (who was reported by Steward Savage, Business Agent Milne and Foreman Lowater to have said "Who does he think he is, the foreman? He can't give orders around here." (Rep. Tr. pp. 32,



54, 92), and was not supported by either Cassidy or Lowater, who, Crowe said, made the statements to him. If either Cassidy or Lowater had made such a statement to Crowe as Crowe alone claims was made by each of them, it is clear from the record that such statement had to be fabrication by each of them, for there is no reason which can be found in the record for either of them to come to such a thought. Both Cassidy and Lowater heard Coghlin complain that Crowe was giving orders and neither said he heard any complaint that Crowe was using the radio. (It is also inconceivable in light of his previous activity in Crowe's behalf that Business Agent Milne would have permitted Crowe to be terminated for using the radio or for attempting to get in touch with the Steward without determined and conclusive intervention on Crowe's behalf.)

### III

THE EVIDENCE CLEARLY SHOWS THAT CROWE WAS PRIMARILY INTERESTED IN GETTING LOWATER OVER TO SITE C AND CONSEQUENTLY, THERE IS NO SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT RESPONDENT'S CONTENTION THAT CROWE WAS PRIMARILY INTERESTED IN GETTING SAVAGE TO SITE C.

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Respondent, although apparently understanding that Amco employed only Electricians to do its work (Respondent's Brief, pages 2-3), seems to contend that the dispute with the Ironworkers over the fan was a dispute under the Amco-IBEW Contract. It





was not. Amco employed no Ironworkers. Amco wasn't violating its IBEW agreement when the Ironworkers were trying to do electrical work, and wouldn't have violated it if the Ironworkers had done the work. To the extent that the fan installation matter was a dispute, it was a jurisdictional dispute, not between Amco and its employees who were members of separate unions, but between the Electricians, Amco employees, and the Ironworkers, employees of Allied-Shaffer. What apparently happened was that Lowater was requested by the general contractor on the day in question to move a fan (Rep. Tr. p. 93). The Ironworkers foreman, the general contractor's employee (undoubtedly because he wanted to get the fan moved sooner than Lowater was moving it) directed his own men (Ironworkers) to move the fan rather than waiting for Lowater and the electricians. Crowe saw the fan being moved and asked the Ironworkers to quit. They did quit and agreed that they knew moving fans was electrical work (Rep. Tr. p. 10). When Lowater arrived at C Site in response to Crowe's call he immediately borrowed two electricians from Cassidy's crew and moved the fans (Rep. Tr. p. 92). He didn't remember even seeing Steward Savage at the site (Rep. Tr. p. 97), and there certainly wasn't any evidence of intervention or activity by Savage regarding any dispute with the Ironworkers. This was, of course, because the Ironworkers had agreed already with Crowe they would not move the fans and would wait for the electricians which agreement they carried out (Rep. Tr. p. 96). Whether or not Savage went to Site C made little difference because he needed to do nothing there



with the Ironworkers. The problem was taken care of by Lowater when Crowe got the Ironworkers to stop work and wait. Lowater and the electricians immediately moved the fan upon Lowater's arrival.

#### IV

THERE IS NO SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT ANY CONCLUSION THAT CROWE WAS FIRED BECAUSE OF ANY PROTECTED ACTIVITIES. THERE IS SUBSTANTIAL EVIDENCE SHOWING THAT CROWE WAS FIRED FOR GIVING ORDERS TO LOWATER, A FOREMAN.

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The constant contention by Respondent that Coghlin and Conley were angered by efforts of Crowe to get Steward Savage to C Site just doesn't make any sense. No one has suggested the slightest reason why Amco would be displeased by Stewart Savage going to C Site or being called to C Site. He was known to be the Steward. Amco certainly knew that Steward's deal with disputes. Steward Savage was dealing with another Ironworker dispute at the time these events took place and there is no evidence that Amco was angered by or objected to his efforts. Not only is there no evidence of any reason for anger if the Crowe call was merely a search for the Steward, but no statement of counsel in argument has indicated any reason why Amco would be angered by such a search.

The only thing resembling a suggestion by Respondent of a motive for firing Crowe other than because of his giving orders to Lowater was made at the hearing. Counsel for the General



Counsel seemed to be suggesting at the hearing, although he never came right out and said so in so many words, that he considered this whole matter of Amco's complaint against Crowe on June 19 was a smoke screen by Amco and that Amco's real reason for firing Crowe was that he had quit in protest to the welder's firing during May, that his doing so was protected activity, and that Amco wanted to get even with him. The welder, incidentally, was an Electrician, not an Ironworker (Rep. Tr. p. 55). As stated before, the existence of such a motive on the part of Amco is the purest conjecture. Conjecture certainly is not sufficient basis for the Board to overrule the contrary finding of the Trial Examiner.

The only witnesses who heard Crowe's call, that is Lowater and Coghlin, both testified that Crowe told Lowater to come over to C Site, and Lowater answered to Crowe that he would be right over. Lowater went right over to C Site. Coghlin was angered at Crowe by what Crowe said over the radio to Lowater and said so immediately. What he was angered at was Crowe giving orders to Lowater and he said so immediately. There is absolutely nothing in the record except Crowe's contradicted and unsupported statement of what Cassidy and Lowater told him was the reason for his firing (using the radio to call the Steward) to indicate that the reason was anything other than Crowe's giving orders. Despite this record the Board overruled the Trial Examiner and found that Crowe was fired because he tried to communicate with his Steward during working hours.



Assuming that Lowater's version of his conversation with Crowe was the correct one (Lowater's version was that Lowater should get hold of Doc Savage and that Lowater should come over to C Site - Rep. Tr. p. 95) rather than Coghlin's (Coghlin's version was that Lowater should come over to C Site), Amco's statement that it was firing Crowe for wrongfully giving orders, stated openly and immediately by Coghlin and testified to by Stewart Savage, Business Agent Milne and Foreman Lowater as well as Coghlin, is nevertheless supported. The finding by the Board that the "reason for discharge was his (Crowe's) conduct in trying to communicate during working hours with his steward, who was at a different work site" is unsupported by substantial evidence and is pure conjecture. If Lowater's version of the Crowe radio call is accurate, the conversation of Lowater with Savage, reported by Milne and Savage, does not refute or cast doubt upon Amco's stated reason for firing Crowe. According to Lowater, Savage and Milne, Lowater, following the call from Crowe, stopped at Site 23 long enough to tell Savage that Crowe wanted Savage over at C Site. This is no indication that Crowe didn't also, during the call, order Lowater immediately to C Site to move the fan as testified by Lowater. The fact that upon telling Savage about the fan Lowater went immediately to C Site and moved the fan is strong corroboration that Crowe told or asked him to do so at that time (as both he and Coghlin testified).

Since Savage, Milne and Cassidy didn't hear Crowe's call, they couldn't and didn't testify that Crowe didn't order Lowater





immediately to C Site. Only Crowe says he didn't do so and his testimony is not corroborated in this respect by any act, omission or statement of anyone.

Since this is the record, there is nothing from which the Board could properly find contrary to the Trial Examiner that Crowe's effort to bring Savage and not Lowater to C Site was the reason for his discharge. There is no basis for the Board to find contrary to the Trial Examiner that it was a contributing cause.

The Trial Examiner's finding that Crowe was discharged because he told Lowater to come to C Site conflicts with no evidence whatever but Crowe's testimony that Cassidy and Lowater told him he was being fired for using the radio. Lowater, before leaving for C Site, saw Coghlin drive up to Site 23 and heard him complain that Crowe was giving orders (Rep. Tr. p. 92). Cassidy testified that Coghlin called for him on the radio and asked him if he or Crowe was running C Site, unquestionably a reference to giving orders. Cassidy said he was supposed to be. Conley came on the radio and told him to get Crowe's time ready (Rep. Tr. p. 41). No testimony from Cassidy was given to indicate he understood or told Crowe he was being fired for using the radio to call the steward. No evidence was given by Cassidy nor Lowater that they had any information that Crowe was being fired for using the radio to call the Steward. There is no evidence, therefore, which conflicts with the testimony of Coghlin and found to be a fact by the Trial Examiner, that the reason Crowe was fired was because he gave orders to Lowater to come to C Site. The Board stated this



was a reasonable finding but wanted to make its own contrary finding.

V

THE TRIAL EXAMINER'S RESOLUTION OF  
CONFLICTING TESTIMONY WAS BASED  
UPON HIS OBSERVATION OF THE Demean-  
OR OF THE WITNESSES AND NOT OTHER-  
WISE AND AS THIS WAS SUPPORTED BY  
SUBSTANTIAL EVIDENCE CANNOT PROPERLY  
BE OVERRULED.

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Respondent contends that it is clear from the record that the Trial Examiner's trust of Coghlin's testimony and distrust of Crowe's was not based on demeanor of witnesses. There is no basis for this contention. The Board is not privileged to ignore a finding that credibility was determined in part from demeanor of witnesses. It is well settled that the Board may disregard the findings of a Trial Examiner where he gives credit to unsupported testimony which conflicts with well supported and obvious inferences from the rest of the record. The converse of that rule is also true. Because the converse is true, the Trial Examiner's finding on veracity of Coghlin and lack of veracity of Crowe in this case cannot be overruled. As indicated above, the Trial Examiner's finding that Crowe was fired for ordering Lowater to C Site is supported by observations of demeanor of witnesses; by the incredibility of Crowe's statement that Cassidy and Lowater told him he was being fired for using the radio to call the steward (Rep. Tr. p. 13); by the fact that Lowater immediately after



Crowe's call went to C Site and moved the fan without incident (Rep. Tr. p. 92), although Crowe denied asking him to go to C Site and denied telling him to do so (Rep. Tr. pp. 21,     ); by the fact that Lowater testified that Crowe told him to come to C Site (Rep. Tr. p. 95); by the fact that Coghlin immediately after the call said he was going to fire Crowe for acting like the foreman and giving orders (Rep. Tr. p. 32); and by the fact that if Savage did go to C Site at all (Rep. Tr. p. 97) he didn't do so until after the fan had been moved by Lowater (Rep. Tr. p. 14).

## VI

WHILE THERE WAS NO SUBSTANTIAL EVIDENCE SHOWING CROWE WAS FIRED FOR CALLING HIS STEWARD, THERE WAS SOME EVIDENCE TENDING TO SHOW CROWE WAS FIRED FOR GIVING ORDERS TO LOWATER, A FOREMAN, TO GO OVER AND GET SAVAGE AND CONSEQUENTLY, EVEN IF THIS VERSION WERE BELIEVED, IT DOES NOT SUPPORT THE CONCLUSION THAT CROWE WAS FIRED FOR ENGAGING IN PROTECTED ACTIVITIES.

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In its opening brief, Amco asked the rhetorical question (paraphrased from page 12 of the Opening Brief): If an order to a foreman to come to C Site would be a violation of Company discipline entitling the employer to terminate the employee, why would an order to a foreman to deliver a message to a steward not be entitled to the same conclusion? Respondent answers that Amco is now changing its position. This is not the case.

When this point is looked at carefully, the following items



are apparent and are relevant to the intended meaning of Amco's argument:

a. Mr. Crowe complained to the National Labor Relations Board that he was fired for using the radio to call his steward; that his call to the steward was connected with his engaging in protected activity, that he was not prohibited from using the radio and that therefore his firing was an act of unlawful discrimination prohibited by the Act.

b. The National Labor Relations Board issued a complaint against Amco Electric.

c. Amco answered that Crowe was fired for giving orders to a foreman when Crowe was not a foreman and was not permitted to give orders.

d. Crowe testified at the hearing that he was told by two Amco foremen, Cassidy and Lowater, that he was being fired for using the radio to call the steward.

e. Amco's superintendent, Coghlin, testified that Crowe was fired for giving orders to Lowater to go to C Site.

f. Cassidy testified that Coghlin complained about Crowe running Cassidy's job, an obvious complaint about Crowe giving orders, and testified to what he told Crowe about Crowe's being fired which didn't include any statement that Crowe was being fired for using the radio.

g. Lowater testified that Coghlin, immediately after Crowe's radio call, complained that Crowe was giving orders and would be fired, and Lowater didn't testify that he told Crowe he





was being fired for using the radio.

h. David Milne, IBEW Business Agent, testified that he knew of no instance where Amco had fired an employee for improperly using the radio.

i. Doc Savage, IBEW steward on the Amco job, testified that Coghlin, immediately after Crowe's call, complained about Crowe giving orders and said he would fire him. Savage testified that Coghlin's complaint was that Crowe issued orders for Savage to go to C Site.

j. The NLRB, but not the Trial Examiner, found that Crowe was fired for attempting to communicate with his steward during working hours.

k. The Trial Examiner, but not the NLRB, found that Crowe was fired for giving orders to Lowater to go to C Site.

l. Only Lowater, Coghlin and Conley heard any call from Crowe. Conley didn't testify. Coghlin and Lowater both testified that Crowe told Lowater to go to C Site. Lowater answered Crowe that he would be right over. Lowater testified also that Crowe told him to tell Steward Savage about a dispute at C Site and to tell Savage to come over, which Lowater testified he did.

m. Lowater went immediately to C Site and moved the fan.

n. Coghlin complained immediately about Crowe giving orders.

It appears that if it weren't for substantial evidence rules, and if all of the evidence were not required to be considered,



three possible findings could have been made:

1. Crowe was fired for calling his steward on the radio during working hours (found by the Board).

2. Crowe was fired for giving orders to Lowater to go to C Site and move the fan (found by the Trial Examiner).

3. Crowe was fired for giving orders to Lowater for Savage to go to C Site (found by neither Trial Examiner nor Board).

As pointed out above, there is no support for the Board's actual finding except an inference from Crowe's testimony which is not a permissible inference in light of Respondent's other witnesses. At this point we should point out that only inference from Crowe's testimony supports the Board's finding because Crowe didn't testify that anyone other than Cassidy and Lowater told him he was fired for using the radio to call the steward. The evidence shows that neither Cassidy nor Lowater actually fired Crowe or decided to fire him. Even if Crowe is believed in his testimony that Cassidy and Lowater told him he was being fired for using the radio to call the steward, in order for this alleged statement of Cassidy and Lowater to progress to a finding of fact, that is, a finding of the reason for firing, it would be necessary to infer from their alleged statement that Cassidy and Lowater knew the reason Crowe was fired to be what Crowe testified he was told. The evidence of what Cassidy and Lowater knew doesn't permit such a conclusion so it prohibits such an inference.

In any event, of the three possible findings, the one found by the Board has no proper support. The one found by the Trial



Examiner has support in the evidence and the Board agrees that it does.

There is at least some evidence in the record which could have supported the finding that Crowe was fired for giving orders to Lowater to deliver a message to Savage to go to C Site (even though the support is insubstantial and insufficient to overturn the Trial Examiner's finding).

With this explanation added, on page 12 and page 13 of its Opening Brief, explained a different way, Amco's point was this: assume a finding had been made that Crowe was fired for giving orders to Lowater to deliver a message to Steward Savage to go to C Site; if such a finding had been made it would merely show that Crowe was fired for a reason somewhat different from that stated by Amco when the incident took place. The reason for the firing, if such had been the finding, would not show unlawful discrimination any more than does the reason for firing which has been stated by Amco from the beginning and found to be fact by the Trial Examiner. Therefore, since this third possibility is the only possible alternative finding to the Trial Examiner's which was supported by any evidence in the record, a case of unlawful discrimination was still not proved even if Coghlin's stated reason for firing Crowe is not believed.

Respondent argues at length that what Crowe said to Lowater, even if his choice of language was bad, or his tone of voice was not exemplary, was not an order, particularly because Crowe was an employee and Lowater was a foreman. This



argument begs the point completely. It appears that Coghlin and Lowater understood what Crowe said to be an order, command or direction (whichever word respondent would prefer). Lowater acted on it and Coghlin objected to it. Crowe knew he wasn't supposed to give orders and that they were to be given only by foremen (Rep. Tr. p. 26). He insisted, however, that all he did was to request Lowater to deliver a message for him. There is little indeed to indicate that this is all he did.

## VII

PROVISIONS OF COLLECTIVE BARGAINING  
CONTRACT SECTIONS 10 AND 11 OF ARTI-  
CLE 3 DO NOT PERMIT A WORKMAN TO  
GIVE ORDERS TO FOREMEN AND THERE  
IS SUBSTANTIAL EVIDENCE IN THE RECORD  
SHOWING THAT THIS IS EXACTLY WHY  
CROWE WAS FIRED.

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Respondent also argues that the provisions in the contract (Sections 10 and 11, Article III) merely establish a chain of command and would not be violated by giving of orders by one who the contract indicated was to receive orders. In the first place, the IBEW is quite capable of enforcing and interpreting its contracts. The contract has ample provisions for adjusting disputes of that kind. This is not a proceeding brought for that purpose. In the second place, the construction of the contract made by the Board, to the effect that the contract was not violated by giving of orders by a journeyman, gives no answer to the question. It is at best only a very literal and technical interpretation. If a man is





hired to do his work as laid out and directed by his foreman, is required to take his orders only from a foreman and the contract requires the employer to designate a foreman for that purpose, which is the import of the contract provisions, it is true that the contract doesn't specifically prohibit the non-foreman from giving orders. It also doesn't require the employer to retain him as an employee when he does give orders thus doing the foreman's job instead of his own. Crowe knew the "chain of command" if that is how respondent would like to characterize the provisions of the contract (Rep. Tr. p. 26).

A fair reading of the contract would indicate, we believe, that a person familiar with the contract and hired as a journeyman electrician and not designated foreman would know good and well it wasn't his job to give orders. Crowe did. He would know that if he spent his time giving orders instead of doing his work his conduct would be subject to some kind of reaction from the employer when the employer learned what he was doing or attempting to do. Whether the reaction of firing was the best possible employer reaction to what was done by Crowe, or whether it would have been better to use a quantity of well chosen words emphatically spoken to Crowe is perhaps a good question, just as the means used in any case to maintain job discipline, and to get the work done are always subject to question. But this is an area of discretion which the employer is permitted to exercise under Section 5 Article II of the Contract, the employer being the one responsible for getting the job done. (NLRB v.



v. Almeida Bus Lines, C.A. Mass., 333 F.2d 725). The employer is responsible for efficiency and morale and job results will show whether he is right or wrong in how he runs his job. If he goes too far and the employee disputes his discipline, the Union grievance procedure may be set in motion. The employer is not permitted to discharge the employee because he is engaging in union activity, but he is permitted to fire the employee for good cause, without cause, or for an unjustified cause so long as union activity is not any part of the reason or reasons for discharge.

General Tire of Miami Beach v. NLRB, (C.A. Fla.

332 F.2d 58;

NLRB v. Florida Steel Corp. (C.A. 5)

308 F.2d 931.

If discrimination may be inferred from mere participation in union activity followed by discharge, that inference disappears when a reasonable explanation is presented to show that the discharge was not because of the union activity. Wellington Mill Division v. NLRB, (CASC) 330 F.2d 579, Cert.den. 379 U.S. 882, NLRB v. United Brass Works, Inc. (C.A. 4) 287 F.2d 689.



## CONCLUSION

For the reasons stated in this and the opening brief, the petition for review should be granted, the recommended order of the Trial Examiner should be affirmed and the decision and order of the National Labor Relations Board should be reversed.

Respectfully submitted,

MILLIKAN, MONTGOMERY,  
FRANCISCUS and OLAFSON

By C. E. MILLIKAN, JR.

Attorneys for Petitioner



CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ C. E. Millikan, Jr.

C. E. Millikan, Jr.

